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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1191

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, and AETNA INSURANCE COMPANY,

Petitioners,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

BRIEF FOR RESPONDENT WEYERHAEUSER COMPANY IN OPPOSITION.

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Question Presented	2
Statement	2
Argument	4
Point I—The Decisions Below Were Clearly Correct	5
Point II—There Is No Conflict of Decision	13
Point III—There Is No Important Question of Federal Law	15
Conclusion	16

CASES CITED

The CALEDONIER, 31 F. 2d 257 (2d Cir. 1929); cert. denied, 279 U. S. 865 14

Graver Tank & Mfg. Co., Inc. v. *Linde Air Products Co.*, 336 U. S. 271 (1949) 4

Kish v. *Taylor* [1912] A. C. 604 (House of Lords) ..13, 14

The MALCOLM BAXTER, Jr., 277 U. S. 323 (1928) 13, 14

Monarch SS Co., Ltd. v. *Karlshamns Oljefabriker (A/B)*, [1949] A. C. 196 (House of Lords) 13, 14

Royal Ins. Co., Ltd. v. *United States*, 87 F. 2d 714 (2d Cir. 1937) 13, 15

PAGE

The TURRET CROWN, 297 Fed. 766 (2d Cir. 1924); cert. denied, 264 U. S. 591 13

United States v. *Wessel, Duval & Co.*, 115 F. Supp. 678 at 684 (S. D. N. Y. 1953) 14

The WAALHAVEN, 36 F. 2d 706 (2d Cir. 1929); cert. denied, 281 U. S. 747 14

The WILLDOMINO, 272 U. S. 718 (1927) 13, 14

STATUTES CITED

United States Carriage of Goods by Sea Act,

46 U. S. C. § 1300 et seq. 3, 4

§ 1304 (5) 3, 4

OTHER SOURCES

Gilmore & Black, *The Law of Admiralty*, § 3-42 at 182 (2d ed. 1975) 15

Prosser, *Handbook of the Law of Torts*, § 34 (4th ed. 1971) 15

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OPINIONS BELOW.

The opinion of the District Court (App. A of Petition) is reported at 372 F. Supp. 859. The opinion of the United States Court of Appeals for the Second Circuit (App. C of Petition) is reported at 507 F. 2d 68.

QUESTION PRESENTED.

Whether a shipowner, who is liable to cargo interests for failure to exercise due diligence to make its vessel seaworthy before and at the beginning of a voyage, is entitled to the benefit of the $500 per package limitation provided by the United States Carriage of Goods by Sea Act, U. S. Code, Title 46, Section 1304(5).

STATEMENT.

This action was brought by Iligan Steel Mills, Inc. *et al.* (cargo interests) against Weyerhaeuser Company, owner of the SS JOHN WEYERHAEUSER, and against New York Navigation Company, Inc., charterer of said vessel, to recover $3,000,000 for wetting, rusting, contamination, breakage and shortage of packages and pieces of steel manufacturing and electrical supplies and equipment shipped by Iligan from Baltimore, Maryland in December 1966 and consigned to Iligan at Iligan City, Republic of Philippines. The Iligan cargo was stowed in Nos. 2 and 4 holds of the vessel and on deck. Other cargo for other parties, fertilizer in bulk, destined for Korea, was stowed in holds Nos. 1, 3 and 5. The fertilizer cargo was loaded and stowed at Tampa, Florida subsequent to the loading of the Iligan cargo at Baltimore. All cargo was in apparent good order and condition when loaded and upon arrival at Iligan City a portion of Iligan's cargo was damaged. The damage resulted from leakage en-route through a hole which had developed in a sanitary line overboard discharge valve located in No. 3 hold. Cargo contended that the shipowner and the charterer failed to exercise due diligence to furnish a seaworthy ship, that they did not properly and carefully carry, keep and care for the cargo, that they

accepted the shipment at a time when they had knowledge that the vessel was grossly unseaworthy and that they knew that the vessel, while undergoing engine repairs at Panama Canal Zone en-route was taking an unusual quantity of water into a cargo hold. Cargo further contended that the conduct of shipowner and charterer was such that they were not entitled to avail themselves of the $500 per package limitation of liability provision of the United States Carriage of Goods by Sea Act (hereinafter COGSA), 46 U. S. C. § 1304(5). The shipowner contended that due diligence had been exercised to make the ship seaworthy; alternatively that the shipowner was entitled to the benefit of the $500 per package limitation of COGSA, 46 U. S. C. § 1304(5).

The District Court found: (1) Weyerhaeuser (shipowner) had failed to exercise due diligence to provide a seaworthy vessel and accordingly was liable to plaintiffs, (2) there was no wilful misconduct or wanton misconduct on the part of Weyerhaeuser, (3) the terms of the United States Carriage of Goods by Sea Act, 46 U. S. C. § 1300 *et. seq.* (COGSA) were applicable and Weyerhaeuser's liability limited to $500 per package of cargo, (4) New York Navigation (charterer) was liable to Iligan (cargo) for breach of warranty of seaworthiness, (5) New York Navigation's liability was also limited to $500 per package, and (6) that New York Navigation was entitled to indemnity from Weyerhaeuser, including its attorneys fee and expenses incurred in defending the action against it by cargo.

The Court of Appeals was substantially in agreement with the opinion of the District Court and concurred in the statement of the facts by the District Court which it incorporated by reference. The findings of the District Court that "plaintiff has not proved that Weyerhaeuser knew or

must have known of the unseaworthy condition of the ship" prior to the Transpacific voyage and that "There was here no wilful and wanton misconduct" were dispositive of the case against Weyerhaeuser. The Court of Appeals also adopted the disposition of the District Court of plaintiffs' arguments against the time charterer, New York Navigation Co., Inc. The judgment of the District Court was affirmed.

ARGUMENT.

There is before the Court no issue as to Weyerhaeuser's (shipowner) liability for lack of due diligence to provide a seaworthy vessel or as to Shipowner's liability to indemnify New York Navigation (charterer) for Charterer's limited liability to Cargo. Petitioners (cargo interests) do not dispute that a Shipowner, liable by reason of lack of due diligence, is nevertheless entitled to limitation of liability to $500 per package under § 1304(5) of the United States Carriage of Goods by Sea Act, 46 U. S. C. § 1300 *et seq.* Their contentions are that the bill of lading (contract of carriage) is void and the statute inapplicable. All their contentions, including their contentions as to misrepresentation, fraud and the unconstitutionality of this statute are based on the premise that Shipowner was guilty of deliberate, intentional, wilful and wanton misconduct (the addition of "gross negligence" in the alternative constitutes no additional grounds, for all relevant decisions, in referring to gross negligence, have equated it with wilful and intentional wrongdoing). Both of the Courts below have found as facts that Weyerhaeuser neither knew or must have known of the unseaworthy condition of the ship and that there was no wilful and wanton misconduct, *cf. Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336

U. S. 271 (1949). The thrust of Petitioners' submission is that these co..current findings of fact were clearly erroneous.

POINT I.

THE DECISIONS BELOW WERE CLEARLY CORRECT.

The JOHN WEYERHAEUSER was a vessel employed in the carriage of merchandise for hire by water and was owned and operated by Weyerhaeuser on the voyage involved. New York Navigation Company, Inc. was engaged in business as an ocean carrier of merchandise by water for hire and chartered the JOHN WEYERHAEUSER. The JOHN WEYERHAEUSER, a Liberty type steamship, built in 1944, was modified in 1961. In the modification program of 1961 part of the cargo holds were altered, certain bulkheads were removed and hatch coverings were refitted; the crew quarters were stripped down, scrapped and rebuilt. The cost of this modification was a little more than half a million dollars.

The JOHN WEYERHAEUSER was subject to annual inspections by the United States Coast Guard and by the American Bureau of Shipping (hereinafter referred to as A. B. S.) as well as to periodic special surveys and to special surveys in the event of a casualty or when material repairs were made. In March, 1966 the vessel underwent a "Special Condition Survey for use by the shipowner's brokers in connection with their dealings with cargo underwriters" in which the main deck, all cargo holds, shell plating above water, the areas particularly subjected to corrosion, and tank top plating in all cargo hatches, were closely examined and found in good condition; plating of numbers 1 and 3 holds gauged, bilge system tested. operational test made of engine, boilers and

machinery and steering gear which were found satisfactory, etc. The surveyor reported:

> The condition of this vessel hull, holds, spaces, machinery, pumping apparatus, boilers and equipment indicates satisfactory maintenance and the condition of this vessel is well above the average cargo vessel of this age group.

The ship was maintained in first class operating condition.

In the conversion of 1961, lower holds numbers 2 and 3 were transformed into a common hold with a cubic capacity in excess of any other hold in the vessel. With the usual drag (draft of the vessel greater aft than forward) drainage was into two bilge wells or "rose boxes" located at the after end of the common hold, one on each side of the vessel. These bilge wells were boxes 7 feet in width across the ship, 18 inches deep and 18 inches long. The top of the bilge well was flush with the cargo bearing surface or ceiling at the bottom of the hold. Each bilge well had a capacity of 65 to 75 gallons and could be pumped in a reasonable short time. Two sanitary drainage or soil lines entered No. 3 hold from overhead close to the after bulkhead with the lines close to the skin of the ship on either side of the vessel. Each line led to a sanitary or storm valve several feet below the overhead. After passing through the valve the line turned at a right angle and passed through the skin of the ship to form an overboard discharge. The soil line discharge valves were located about two feet beneath the 'tween deck and about 20 feet above the bottom of number 3 lower hold so that the overboard outlet was not submerged until the mean draft of the vessel reached about 25 feet 6 inches. The storm valve contained a clapper within its body. This clapper was not intended to be water-tight and to prevent access

of water from outside into the soil line itself. It was designed to prevent the force of the seas outside causing a back up in the soil line into the toilets overhead. Irrespective of the clapper, no water could enter cargo spaces as long as the pipes and shells of the valves were intact.

Prior to the voyage in question the JOHN WEYERHAEUSER made a voyage from Norfolk, Virginia to Madras, India where her cargo of ammonium sulphate was discharged during the period 11 August to 7 September 1966. On 7 September the vessel sailed for West Coast ports of the United States in ballast via Singapore for bunkers. At no time during the voyage to India and return to Portland, Oregon did the bilges overflow. At no time was there any entry of water into number 2-3 cargo hold. This common hold was carefully examined upon completion of discharge and there was no evidence of the entry of any water. On return of the vessel to Portland there was no indication of any leakage whatsoever into number 2-3 hold. There was no water damage to the cargo of ammonium sulphate carried to and delivered at Madras. The captain believed that a pumping problem which occurred at Madras was due to a back-up from the bilge suction line. On August 16, September 1, 2, 9, 16 and 20, 1966 there were continuing attention and repairs to bilge pumps, valve chests, valve springs, suction valves and cargo hold bilge strainers. There were no significant bilge soundings or pumping en route from Singapore to Portland. On arrival at Portland in addition to generator and voyage repairs the ship also underwent a Biennial United States Coast Guard inspection and an A. B. S. 2nd Special Periodic Survey No. 2 and Load Line Survey. Marine Superintendent Baumgartner attended with the surveyors, although not constantly at their side. He entered number 2-3 hold and made an examination as to whether the vessel had sustained any damage from cargo operations that had not been

reported. He testified that if a sanitary line had been leaking there would be a foul odor and if there had been any leak through a body valve or a gasket there would be signs of salt rust and corrosion running down the side of the ship. He saw no evidence of any such leakage. As shown by all the surveys, there was no evidence of any leakage into No. 3 cargo space. There had been and was no report from any vessel personnel that there was any problem in that area. The discharge valves were in fact opened, examined and found in good order in both 1962 and 1965. The sanitary discharge valves were not opened in 1966, but were included in the general visual inspections. It was found after the casualty that the discharge valve that failed had become wasted on the inside, but that except for the particular area where wastage occurred, the metal in the valve was sound and externally presented a good appearance. Both Operations Manager Mandle and Marine Superintendent Baumgartner were positive that at no time prior to the arrival of the vessel at Moji enroute to Iligan City had they received any oral or written reports about any leakage or back up of water into No. 3 bilges.

After completing repairs, inspections and surveys at Portland the vessel loaded a full cargo of wet, green lumber and sailed from Coos Bay on 31 October for Boston and Portsmouth, Rhode Island. On several days during this voyage there were log entries of 20 or 24 inches in one or the other of the No. 3 bilges. On this inter-coastal voyage the soil line discharges were either on the water line or 6 inches above. On an inter-coastal voyage, such as this, with transit from cool climate to tropics and return to cold climate it was normal for there to be substantial sweating and drainage from the wet lumber. Numbers 2 and 3 were a common hold with bilge wells at the after end of number 3 and the common hold was far greater in size than numbers 1, 4 and 5 so that more accumulation was to be

anticipated in the number 3 bilges. There was substantial accumulation in the other holds as well, with soundings up to 13 inches in number 1, 17 inches in number 4 and 18 inches in number 5. The inter-coastal soundings are properly attributable to sweat and drainage. After completing discharge of the lumber cargo the vessel proceeded to Baltimore where on 12 December 1966 she was delivered by the shipowner to New York Navigation Company under time charter for a voyage from the East coast of the United States to the Far East. At the time of delivery an on-hire survey was conducted and further survey was made by representatives of the National Cargo Bureau. An inspection of the holds was made by Captain Rikkers acting for charterer. All cargo compartments and adjacent decks areas were examined and were found in general good order and condition. The hull, deck machinery, hatch covers, etc. appeared to be in good repair and to have been well maintained. Prior to loading, the charterer erected a non-watertight wooden bulkhead between numbers 2 and 3 holds. Loading at Baltimore commenced on 12 December and was completed on 16 December; 2,000 tons of mill machinery, factory equipment and supplies were loaded in numbers 2 and 4 lower holds and 'tween decks with 224 tons of this amount being loaded on-deck and across numbers 2 and 4 hatches (there was no issue involving the on-deck cargo). The cargo was shipped under New York Navigation Company form Bill of Lading.

At Baltimore bilge soundings were routine until 15 December 1966 when 18 inches were found in number 3 port bilge (the soil lines were more than 12 feet above water level). On the day before these soundings at Baltimore there was very heavy snow and rain requiring suspension of work and the carpenters were unable to close number 3 hatch. There were also 12 to 15 inch readings in number 1 and 18 inches in number 5 bilges. The bilge

readings at Baltimore were due to working the vessel with open hatches during snow and rain. The vessel sailed on 16 December for Tampa, Florida where she arrived on 22 December. At Tampa the vessel on 22 and 23 December, after a further survey of the holds, loaded in numbers 1, 3 and 5 lower holds and 'tween decks 6,996 tons of triple super phosphate in bulk for Korea. Pre-loading survey at Tampa was conducted by the National Cargo Bureau. After thorough inspection no moisture or traces of water could be found. There was no indication of any leaking. There was no smell of sewage. On 23 December 1966 the vessel sailed from Tampa for Korea via the Panama Canal. The vessel arrived at Cristobal, Canal Zone on 29 December for bunkers and repairs to the main engine necessitated by misalignment of a high pressure piston rod components and a fractured crosshead. Engine repairs commenced on 30 December under the supervision of the American Bureau of Shipping. Repairs were completed on 13 January 1967 and a certificate of seaworthiness was thereupon issued by the American Bureau of Shipping.

From Baltimore to Tampa bilge soundings were normal. At Tampa 25 tons fresh water were taken on board. The vessel sailed on the evening of 23 December for the Canal Zone with a mean draft of 26 feet 4 inches. Commencing on 24 December there were soundings in excess of 18 inches in number 3 port bilge. There were 2 inches on arrival Cristobal, C. Z. on the morning of the 29th and 38 inches in the afternoon while bunkering and taking on fresh water. At this time the master tasted the bilge water and found it fresh. Thereafter during the 14 day stay at the Canal Zone soundings were normal except on 6 and 7 January when fresh water was again taken on board. Trash was removed from number 3 port cargo hold bilge valve on 26 December and the bilge pump rods were repacked the next day. Further repairs were made on 28 January and 4

February 1967 when a broken disk guide was replaced, disk machined and ground in and rubber lining installed. Except as noted the number 3 port bilge soundings were normal during the time the vessel was at the Canal. At no time during the voyage were the soundings in the number 3 starboard bilge in excess of the depth of the bilge. The master reasoned that the soundings in number 3 port bilge were due to a back up of fresh water through the bilge system during and after the taking on of fresh water. He presumed it was coming from some place in the engine room, that he had the problem under control through maintenance work performed and pumping, and that he could continue the voyage safely from the Panama Canal. Neither the M ster nor the Chief Engineer nor any other vessel personnel made any report of any problem concerning leakage or pumping to the Company's supervisory staff, either during the previous foreign voyage, the previous inter-coastal voyage or the voyage in question until the vessel arrived at Moji.

On 13 January anchor was aweigh and vessel commenced transit of Panama Canal. During the 40-day trans-Pacific passage to Moji, Japan where the vessel intended to take bunkers, the weather was not unusually severe. Cargo holds were inspected by the Chief Officer to the extent permitted by the nature of the cargo stowage on 31 December 1966, 20 January and 3 and 13 February and found in good condition. The vessel arrived at Moji quarantine anchorage on 22 February. At the time of anchoring the vessel appeared to the master to be out of trim and down by the head. The chief mate again checked the cargo holds, entering number 3 hold. He found that the phosphate had settled along the forward bulkhead and the sides and that the surface of the phosphate on the periphery of the stow was wet. On further inspection sea water was found enter-

ing through a hole in the overboard discharge value of the sanitary line which entered the port after corner of number 3 lower hold from overhead. This hole, which was about 1¼" x ¼" in size, was located on the underside of the horizontal portion of the valve (inboard of the clapper in the valve). Number 2 lower hold was flooded to a depth of 13 feet so that much of the stow of cargo was submerged. It was also apparent that a large quantity of phosphate had been carried along with the water which had entered number 2 lower hold.

Shoreside assistance was obtained at Moji. A cement box was installed around the leaking valve. Under water inspections were made by divers. No cracked plate was found and no dents or damage were found in way of number 3 hold. No leakage through any of the shell plating or any source other than the sanitary line discharge valve was found after discharge at Iligan or after the return of the vessel to the United States. The vessel sailed from Moji on 26 February and arrived at Mokpo, Korea on 28 February. Discharge of phosphate into barges commenced shortly after arrival at Mokpo. On 18 March the vessel sailed for Moji where she called briefly for bunkers on 19 March, sailing again for Iligan on 20 March and arriving and docking at Iligan City on the evening of 26 March.

At Iligan the vessel was attended throughout the course of discharge by numerous representatives of all parties concerned. Except for the discharge valve on the port soil line in number 3 lower hold, the hull, deck machinery, hatch covers etc., were found to be in good repair and to have been well maintained. The port valve was brought on deck and examined by surveyors. The port clapper valve when inspected appeared sound externally, save the wasted area around the end of the seat where the holed wasted area had been built up by welding at Mokpo. The water and

fertilizer in number 3 lower hold had formed a slurry which had penetrated the temporary bulkhead between numbers 2 and 3 cargo compartments. Some of the cargo in number 2 lower hold was in good order and condition; some cargo was cleaned and repaired at Iligan; some cargo was abandoned as worthless and other cargo was returned to the United States for reconditioning and repair.

The foregoing statement of facts, fully supported by the record, establishes that prior to departure from Tampa en route from Baltimore to Iligan City, there was no indication of leakage from or apparent defect in the sanitary valve that failed, that the vessel had been well maintained and was in apparent good condition, that there had been no report from the vessel of any leakage from the sea into any cargo space and that numerous, frequent and recent inspections had disclosed nothing to the contrary. The findings of both Courts below that there was no wilful or wanton misconduct were clearly correct.

POINT II.

THERE IS NO CONFLICT OF DECISION.

Petitioners urge that the decision of the Court of Appeals in this case is in conflict with the principles of *The WILLDOMINO*, 272 U. S. 718 (1927), *The MALCOLM BAXTER, JR.*, 277 U. S. 323 (1928), and *Monarch SS Co., Ltd.* v. *Karlshamns Oljefabriker (A/B)*, [1949] A. C. 196 (House of Lords). There is no conflict.

Lack of due diligence, whether of the owner or the master, to furnish a seaworthy vessel does not abrogate the contract of carriage. *The MALCOM BAXTER, JR.*, 277 U. S. 323 (1928); *Kish* v. *Taylor*, [1912] A. C. 604 (House of Lords); *Royal Ins. Co., Ltd.* v. *United States*, 87 F. 2d 714 (2d Cir. 1937); *The TURRET CROWN*,

297 Fed. 766 (2d Cir. 1924); cert. den., 264 U. S. 591; *The CALEDONIER,* 31 F. 2d 257 (2d Cir. 1929); cert. den., 279 U. S. 865; *The WAALHAVEN,* 36 F. 2d 706 (2d Cir. 1929); Cert. den., 281 U. S. 747. In *United States* v. *Wessel, Duval & Co.,* 115 F. Supp. 678 at 684 (S. D. N. Y. 1953), the court restated the rule:

> The United States is therefore left only with the claim that failure to use due diligence to make the ship seaworthy can amount to a deviation. Nothing like such conduct on the part of a carrier has ever been given the effect of deviation. The farthest that I have found the courts going away from the original conception of a departure from the ship's route is their acceptance of a breach of contract for special stowage of cargo as a deviation.

In *The WILLDOMINO, supra,* inexcusable deviation was found by reason of geographical departure from an ordinary, intended course necessitated by the *wilful* action of the owners in directing sailing with a known insufficiency of fuel for that voyage. There was no such wilful action in the present case. In *The MALCOLM BAXTER, JR., supra,* where it was held that departure from the voyage described in the bill of lading due to unseaworthiness resulting from lack of due diligence was not voluntary and was excusable, the Court distinguished *The WILLDOMINO* on the ground that the knowledge and intent on sailing to deviate, found in *The WILLDOMINO,* was not present. *Kish* v. *Taylor, supra,* is in accord. Both *Kish* v. *Taylor* and *The MALCOLM BAXTER, JR.,* were cited with approval in *Monarch SS Co., Ltd.* v. *Karlshamns Oljefabriker (A/B), supra,* where Lord Porter said, [1948] A. C. at page 212:

> Undoubtedly deviation necessarily made to remedy unseaworthiness does not amount to unjustifiable

> deviation or destroy the right to rely upon the terms of the contract of carriage unless it is established that the owners knew of the vessel's state on sailing.

In the present case, as the Court of Appeals indicated, the findings that Weyerhaeuser neither knew or must have known of the unseaworthiness and that there was no wilful and wanton misconduct dictated the result that was reached. The further discussion by the Court below of gross negligence was not necessary to its decision. There was no indication, however, that the Court intended any modification of the doctrine that a party remains fully liable for the consequences of wilful and intentional misconduct. There was no statement that the rule established in this Court and followed by the Courts below as to such conduct should be modified. As in *Royal Ins. Co.* v. *United States,* 87 F. 2d 714 (2d Cir. 1937), on which the Court of Appeals relied, where it was said at page 716 that for all practical purposes "gross negligence" amounts to the same thing as "deliberate intention", consideration of gross negligence is unnecessary. The Courts below, rather, were concerned with the difficulties in defining and applying varying degrees of negligence, citing Prosser, Torts, § 34 (4th ed. 1971). As to extension of the principle of "quasi-deviation "generally, see Gilmore & Black, Admiralty, § 3-42 at 182 (2d ed. 1975).

POINT III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

There is in this case only a matter of factual determination and the application of established principles of law relating to limitation of liability for lack of due diligence to $500 per package of cargo.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 7, 1975